

**United States Department of Labor
Employees' Compensation Appeals Board**

JAMES T. HAGAN, Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Philadelphia, PA, Employer**

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**Docket No. 06-113
Issued: February 1, 2006**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2005 appellant filed a timely appeal of a June 2, 2005 decision of an Office of Workers' Compensation Programs' hearing representative, affirming an April 20, 2004 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issues of this case.

ISSUE

The issue is whether appellant has more than a four percent permanent impairment to his left leg, for which he received a schedule award on April 20, 2004.

FACTUAL HISTORY

On December 22, 2001 appellant, then a 44-year-old tractor-trailer operator, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury when his truck went over a pot hole while in the performance of duty. The Office accepted the claim for a herniated L4-5 disc, and appellant underwent a discectomy on March 13, 2002. He returned to light duty on June 10, 2002, and full duty on September 18, 2002.

In a report dated September 25, 2002, Dr. Saeid Alemo, a neurologist selected as a second opinion physician, provided a history and results on examination. He reported a normal sensory and motor examination and found that appellant had made a full recovery from the employment injury.

Appellant submitted a report dated September 27, 2002 from Dr. David Weiss, an osteopath, who provided a history and results on examination. Dr. Weiss opined that appellant had an eight percent permanent impairment to the left leg, based on Tables 15-15 and 15-18 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He reported that for the L4 nerve root appellant had a four percent impairment, and for the L5 nerve root appellant had an additional four percent.

The Office requested that Dr. Alemo review the medical evidence and provide an opinion as to any permanent impairment to the leg. In a report dated December 3, 2002, Dr. Alemo reiterated that he could not find any evidence of sensory deficit in the left leg and that appellant had made a full recovery from the employment injury.

Based on the reports of Dr. Alemo and Dr. Weiss, the Office found that a conflict in the medical evidence existed. It referred appellant, together with medical records and a statement of accepted facts, to Dr. Linda Sykes, a Board-certified neurologist. In a report dated September 17, 2003, Dr. Sykes provided a history, reviewed medical records and reported results on examination. She noted that appellant reported intermittent dysesthesias involving the left lateral thigh, occasional tingling on the bottom of the left foot and subjective report of decreased sensation in the left lateral calf and foot. Dr. Sykes stated that appellant "has evidence on examination, though subjective, of a persistent unilateral L5 nerve root sensory deficit" which resulted in a four percent impairment under the A.M.A., *Guides*. Dr. Sykes identified Tables 15-15 and 15-18 of the A.M.A., *Guides* in support of her opinion.

By report dated April 12, 2004, an Office medical adviser reviewed the medical evidence with respect to permanent impairment. The Office medical adviser opined that appellant had a 4 percent impairment based on 80 percent of the maximum 5 percent for L5 sensory deficit or pain under Tables 15-15 and 15-18. He indicated that the date of maximum medical improvement was September 18, 2002, when appellant returned to work.

In a decision dated April 20, 2004, the Office issued a schedule award for a four percent permanent impairment to the left leg. The award ran for 11.52 weeks from September 18, 2002.

Appellant requested a hearing before an Office hearing representative, which was held on February 23, 2005. He submitted a report dated March 22, 2005 from Dr. Weiss, who stated that Dr. Sykes had reported decreased sensation over the left lateral calf and left lateral foot. Dr. Weiss opined that this area was supplied by the L4, L5 and S1 nerves, and therefore appellant had 4 percent impairment for each of these nerves, resulting in a 12 percent impairment to the leg.

By decision dated June 2, 2005, the Office hearing representative affirmed the April 20, 2004 schedule award decision. The hearing representative found that the weight of the evidence was represented by Dr. Sykes.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.404 of the implementing federal regulation,² schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.³

The Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.⁴ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁵

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁶

ANALYSIS

The Office determined that a conflict existed under 5 U.S.C. § 8123(a). Dr. Weiss, an attending osteopath, had opined that appellant had an eight percent impairment to his left leg based on sensory deficit in the L4 and L5 nerve roots. Dr. Alemo, a second opinion neurologist, had found no sensory deficit or other residual of the employment injury and therefore no employment-related permanent impairment.

To resolve the conflict, the Office referred appellant to Dr. Sykes. In her September 17, 2003 report, Dr. Sykes provided results on examination and reviewed medical records. Dr. Sykes applied Table 15-15 and 15-18 and opined that appellant had a four percent impairment for sensory deficit for an L5 nerve root impairment. Table 15-18 provides that the

¹ 5 U.S.C. §§ 8101-8193.

² 20 C.F.R. § 10.404.

³ *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁴ 5 U.S.C. § 8123.

⁵ 20 C.F.R. § 10.321 (1999).

⁶ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

L5 nerve root affecting the lower extremity has a maximum leg impairment of five percent.⁷ The impairment is graded according to Table 15-15; 80 percent of the maximum impairment (the 4 percent identified by Dr. Sykes) is a Grade 2 impairment for “decreased superficial cutaneous pain and tactile sensibility (decreased protective sensibility), with abnormal sensation or moderate pain, that may prevent some activities.”⁸ The Office medical adviser concurred that the impairment was four percent, based on Tables 15-18 and 15-15.

As noted above, the opinion of an impartial medical specialist, if well rationalized and based on a proper background, is entitled to special weight. Dr. Sykes provided a reasoned medical opinion in this case, based on a complete background, and her opinion is entitled to special weight. Appellant argues that the opinion was not sufficient to resolve the conflict as Dr. Sykes did not explain how the tables were used. Dr. Sykes properly identified the tables used (the same tables identified by Dr. Weiss in his September 27, 2002 report) and the affected nerve, and it is clear how the impairment rating was calculated.

The Board notes that appellant submitted an additional report from Dr. Weiss, who was on one side of the conflict resolved by Dr. Sykes. An additional report of a physician on one side of the conflict is generally not sufficient to overcome the weight of the impartial specialist or create a new conflict.⁹ Dr. Weiss refers to the findings of Dr. Sykes and provides his own interpretation, but Dr. Sykes provided the results on examination and a reasoned opinion based on those findings. Her report is entitled to special weight and represents the weight of the medical evidence in this case.

CONCLUSION

The Board finds that appellant has not established a permanent left leg impairment greater than the four percent awarded on April 20, 2004.

⁷ A.M.A., *Guides* 424, Table 15-18.

⁸ *Id.* at 424 Table 15-15.

⁹ See *Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 2, 2005 is affirmed.

Issued: February 1, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board